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IN THE

Supreme Court of the United States

Nos. 72-459 & 72-620

GRACE SLOAN, as State Treasurer of the Commonwealth of Pennsylvania, *et al.*,
Appellants,
v.
ALTON J. LEMON, *et al.*,
Appellees.

Supreme Court, U.S.
FILED
APR 16 1972
MICHAEL RODAK, JR., CLERK

HENRY E. CROUTER,
Appellant,
v.
ALTON J. LEMON, *et al.*,
Appellees.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

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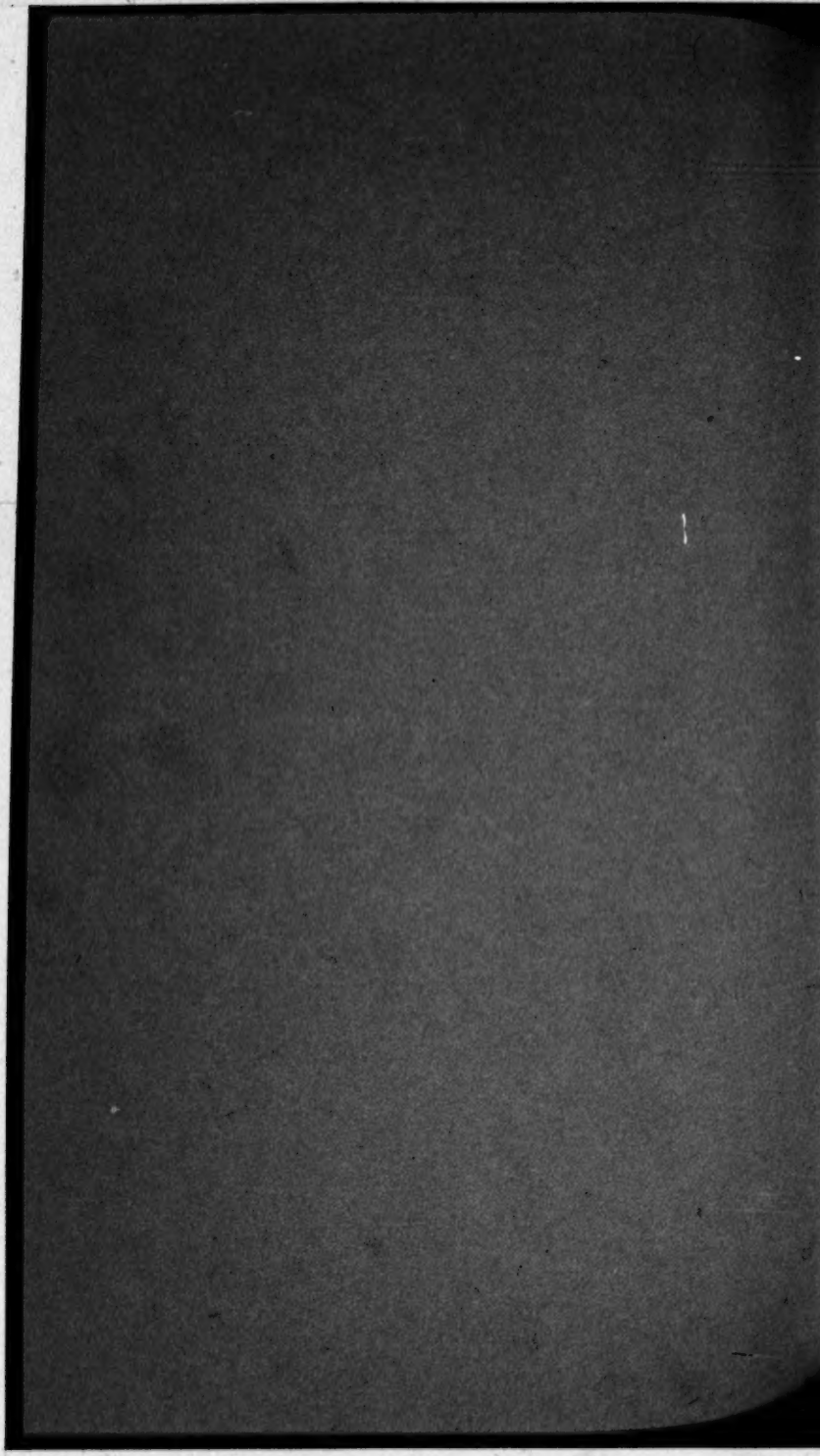

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The National Education Association and the Horace Mann League hereby move, pursuant to Rule 42 of the Rules of the Court, for leave to file the attached brief amicus curiae on the merits of the cases at bar, in support of appellees. Both sides in No. 72-620 and the ap-

pellees in No. 72-459 have consented to our filing this brief, but appellants in No. 72-459 have not.[1]

I. INTEREST OF AMICI

The National Education Association (NEA) is an independent, voluntary organization of educators open to any person who is actively engaged in the profession of teaching or other educational work, or any other person interested in advancing the cause of education. It is the largest professional organization in the nation. Currently, NEA has over one million, one hundred thousand regular members, the large majority of whom serve public school systems in the various States.

The Horace Mann League is an independent national organization of some five hundred leading educators. The League exists to perpetuate the ideals of Horace Mann; its basic purposes are to strengthen public education and to preserve the American tradition of separation of church and state.

These appeals involve a challenge to the constitutionality of the Pennsylvania Parent Reimbursement Act for Nonpublic Education. This Act provides for tuition reimbursement payments to parents of children attending qualified nonpublic elementary and secondary schools. Approximately 90% of the children who attend such nonpublic schools in Pennsylvania are enrolled in religious schools. Appellees claim that the Pennsylvania statute violates the Establishment Clause of the First Amendment of the United States Constitution.

---

[1] The letters of consent have been filed with the Court. Since both sides in No. 72-620 have consented, it may be that no motion is necessary for us to file this amicus brief. Since the two cases have been consolidated, however, and since Rule 42(2) speaks of the consent of *all* parties, we believe that we are required to proceed by way of motion.

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NEA and the Horace Mann League acknowledge the contributions made by private sectarian educational institutions in this country. Nonetheless, we are concerned over diversion of public money to the support of those institutions and the impact of such support upon the future of public education. We seek leave to file this brief because the Pennsylvania statute would bring about such a diversion.

The maintenance of a system of public education is a "paramount responsibility" that "ranks at the very apex of the function" of a State. *Wisconsin* v. *Yoder*, 406 U.S. 205, 213 (1972). See also *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954). Public funding of sectarian schools, whether through direct subsidy or through indirect means such as tuition reimbursements to parents of children who attend them, could have a serious effect on the capability of the public schools to discharge this "paramount responsibility." First, such funding would divert badly needed public money to these religious institutions or to those who support them. There is at this time a financial crisis not only in private education, but also in public education. The one crisis ought not be alleviated by means that exacerbate the other. Second, such funding could lead to a renewal of the often bitter church-state controveries which the First Amendment seeks to avoid and the injury to the educational environment in the public schools that such religious divisiveness would engender.

Lastly, to the extent that funding of private sectarian education increases the enrollment at such schools, it will reduce the pluralistic composition of public school student bodies so vital to the democratic ideal and to the educational process itself. See President's Commission on School Finance, *Schools, People and Money: The Need for Educational Reform*, pp. xix, 15 (March 3, 1972). Mr. Justice Brennan, concurring in *School District* v.

Schempp, 374 U.S. 203, 241-242 (1963), expressed this important aspect of American public education in the following terms:

> ". . . [T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. . . . It is implicit in the history and character of American public education that the public schools serve a uniquely *public* function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort—an atmosphere in which children may assimilate a heritage common to all American groups and religions [citation omitted]." (Emphasis in original.)

Part II of our amicus brief presents statistics which are matters of public record and from which may be computed the percentage of all nonpublic school children in Pennsylvania who attended religious schools in the years 1969-70, 1970-71, and 1971-72. No other brief that we have seen presents statewide statistics which are as current.

II. TIMELINESS

The attached amicus brief supports the position of appellees in the two consolidated cases and must therefore be "presented within the time allowed for the filing of the appellees' brief." Supreme Court Rule 42(2). Appellees' brief was due thirty days after their receipt of appellants' briefs. Supreme Court Rule 41(2).

Appellants' briefs were filed on March 2nd (Appellants Diaz *et al.* and Appellant Crouter) and on March 6th (Appellant Sloan). The office of counsel for appellees was unable to tell us exactly when these briefs were received. The certificate of service filed with the Court by counsel for Appellant Sloan states that the parties were served

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by mail. We believe that we are entitled to the general presumption in the Federal Rules of Civil Procedure, Rule 6(e), and the Federal Rules of Appellate Procedure, Rule 26(c), that service by mail takes three days. Accordingly, the thirty-day period for the filing of appellees' brief, and supporting amicus briefs, would be computed from March 9th. Such a computation yields April 9th as the due date (since April 8th is a Sunday).

This motion is being filed on or before April 9, 1973.

CONCLUSION

Wherefore, the National Education Association and the Horace Mann League request that this Court grant leave to file the accompanying brief amicus curiae urging affirmance of the judgment below.[2]

Respectfully submitted,

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[2] The National Education Association and the Horace Mann League have already filed a brief amicus curiae in No. 72-694, *Committee for Public Education & Religious Liberty* v. *Nyquist* (motion for leave to file granted March 26, 1973), involving an attack on the New York statute which provides for tax benefits for parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools in New York State.

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BRIEF AMICUS CURIAE ON BEHALF OF THE NATIONAL EDUCATION ASSOCIATION AND THE HORACE MANN LEAGUE

The nature of the interest of the amici curiae is set forth in the preceding motion for leave to file. Amici adopt the Statement of the Case set forth at pages 4 to 9 of the Brief for Appellants Diaz *et al.*, in No. 72-459.

ARGUMENT

I. INTRODUCTION

The district court in this case, in its opinion denying appellants' motions to dismiss the complaint for failure to state a cause of action (App. 37a), declared the Pennsylvania Parent Reimbursement Act for Nonpublic Education unconstitutional under the Establishment Clause of the First Amendment because it found that the Act violates the "primary effect" test set out as one of the three tests in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971):

> "First, the statute must have a secular legislative purpose; *second, its principal or primary effect must be one that neither advances nor inhibits religion,* . . . ; finally, the statute must not foster 'an excessive government entanglement with religion.' . . ." (Emphasis added.) 403 U.S. at 612-13.

From the wording of the court's later order granting appellees' motion for summary judgment, it is clear that violation of the primary effect test remained the ground the court's decision:

> "[I]t appearing that more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating [*sic*] and promoting religious faith, and in accordance with our Opinion dated April 6, 1972, denying the motion[s] of the defendant[s] to dismiss, it is ORDERED as follows:
>
> "1. The motion of the plaintiffs for summary judgment is GRANTED;
>
> ". . . ." App. 87a.

Amici contend that the district court correctly analyzed the Pennsylvania statute and correctly determined that it violates the Establishment Clause of the First

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Amendment. We contend that the Act violates the neutrality principle in that its principal or primary effect is to advance religion by directly subsidizing a limited class of citizens consisting predominantly of parents who send their children to religious schools. It may well be that the Act is unconstitutional for one or more additional reasons under the Establishment Clause, but those issues we leave to others.

II. INCORPORATION OF THE PRIMARY EFFECT ARGUMENT IN THE NEA AMICUS BRIEF IN NO. 72-694

Amici have filed a brief with this Court in No. 72-694, *Committee for Public Education & Religious Liberty* v. *Nyquist*. That appeal challenges the constitutionality of the New York statute which provides for tax benefits for parents who have paid tuition for their children to attend nonprofit, nonpublic elementary and secondary schools in New York State. Our brief in support of appellants presents in detail the "primary effect" argument in the context of that statute and the circumstances of parochial school enrollment in New York State.[1]

It is our contention that the primary effect argument presented in that amicus brief is fully applicable to the Pennsylvania statute. First, for the purpose of the primary effect argument we see no critical difference between a statute which provides tax benefits for parents who pay tuition to nonpublic schools and one which provides direct payments to such a group of parents. Sec-

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[1] Fall 1970 enrollment figures for New York State showed that 84.3% of the nonpublic elementary and secondary school children were enrolled in Roman Catholic parochial schools. An additional 8.5% attended schools operated and controlled by other religious groups. Thus a total of 92.8% of the nonpublic school children attended religious schools. Amicus Brief for National Education Association *et al.*, No. 72-694, at 14.

ond, in Pennsylvania and New York the percentages of nonpublic school children attending religious schools is very nearly the same—close to 90%. For these two reasons, we hereby adopt the argument in our amicus brief in No. 72-694 as fully applicable to the Pennsylvania statute.

For the benefit of the Court, we present here an outline of the primary effect argument now in our amicus brief in No. 72-694, as it applies to this case.

(1) The class of persons directly benefited by the statute is the class of parents who have chosen to send their children to nonpublic schools. Compare NEA Brief (No. 72-694) at 16.

(2) Approximately 90% of the children attending nonpublic schools in Pennsylvania are in religious schools, and approximately 88% attend Roman Catholic parochial schools.[2] These figures are documented in Part III of

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[2] That an essential purpose of Roman Catholic parochial schools is the promotion of the Catholic faith is eloquently expressed in the following words of Bishop Joseph L. Bernardin, General Secretary of the U.S. Catholic Conference, Washington, D.C., in an address entitled "Catholic Education Serving a Troubled Society," published in Report of the Proceedings and Selected Addresses at the Sixty-Sixth Annual Convention of the National Catholic Educational Association, Detroit, Michigan, April 7-10, 1969, 66 NCEA Bulletin, No. 1, at 7, 9 (August 1969):

"It would be a tragic mistake if the Church in this country were suddenly to phase out most of its schools. I am firmly convinced that our schools have shown themselves to be an effective instrument in the fulfillment of the Church's teaching mission. I do not subscribe to the thesis that because conditions are different now from what they were when our schools were established, they are no longer needed at all. The purpose of our schools even in the past was much broader than that of simply 'protecting' the faith of our children in a sometimes religiously hostile environment. Catholic schools have been a source of vigorous Catholic life in the United States. Catholic educators have always maintained that a Catholic school is not one which teaches religion only during one period each day. Rather, the whole atmosphere of the school

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this brief, *infra*. Compare NEA Brief (No. 72-694) at 14-15, and note 1 *supra*.

(3) Hence, the class of persons directly benefiting from the statute is overwhelmingly a class of persons who have exercised a religious preference. Contrary to the assertion in the Brief of Appellants Diaz *et al.*, at 18, such a parent differs from "a recipient of public assistance in Pennsylvania, who . . . may pay over to a church the earmarked assistance which he receives." Public welfare assistance, typically, is conditioned on economic need and on ability and willingness to secure employment; tuition reimbursement payments are conditioned on sending one's children to nonpublic schools, the overwhelming majority of which are religious. Compare NEA Brief (No. 72-694) at 22-23.

---

is to be a Christian one, animated by a community of faith—the children, the teachers and the parents.

"Coupled with a living liturgy and parents alive to their responsibility as primary educators of their children, the Catholic school is a proven and powerful instrument for achieving the aim of religious education: to develop a living, personal faith, illuminating the knowledge which students gradually gain of the world, of life and of mankind.

"That philosophy is clearly evidenced in Vatican II's *Declaration on Christian Education*:

> *The Church's involvement in the field of education is demonstrated especially by the Catholic school. No less than other schools does the Catholic school pursue cultural goals and the natural development of youth. But it has several distinctive purposes. It aims to create for the school community an atmosphere enlivened by the gospel spirit of freedom and charity. It aims to help the adolescent in such a way that the development of his own personality will be matched by the growth of that new creation which he became by baptism. It strives to relate all human culture eventually to the news of salvation, so that the light of faith will illumine the knowledge which students gradually gain of the world, of life, and of mankind.* (C.F. [*sic*, misprint for "Cf."] *Declaration* #8)" (Italics in original.)

(4) The tuition reimbursement plan is intended to induce and encourage its recipients to continue to send their children to nonpublic schools. See Section 2(4) of the Pennsylvania Act:

> "Should parents of children now enrolled in nonpublic schools be forced by economic circumstances to transfer any substantial number of their children to public schools, an enormous added financial, education and administrative burden would be placed upon the public schools and upon the taxpayers of the State. . . . [T]herefore, parents who maintain students in nonpublic schools provide a vital service to the Commonwealth." App. 57a-58a.

There is no doubt that the direct financial subsidization will have the effect of tending to maintain nonpublic school enrollment. We agree with appellants that, strictly speaking, the parents are not a "conduit" for the transmission of funds to the nonpublic schools, insofar as this metaphor may suggest that the parents are obligated to spend the payments they receive on tuition for nonpublic schools. See Brief of Appellants Diaz *et al.*, at 16. As the statutory scheme is set up, however, no parent receives a payment unless he has sent his child to a nonpublic school and paid tuition to such a school. See Section 7 of the Act, App. 61a; compare NEA Brief (No. 72-694) at 16-17. The obvious effect of the plan, therefore, is to benefit the nonpublic schools by making it substantially less expensive for parents to send children to them. And, as the figures in paragraph (2) show, these nonpublic schools are overwhelmingly religious and, in particular, overwhelmingly Roman Catholic.

(5) An intended effect of the statute is financial benefit to the general class of taxpayers, through reduced educational costs to the Commonwealth. See Section 2(4), quoted *supra*. This is not a present or immediate effect of the statute, nor is it clear that it is a likely effect. See NEA Brief (No. 72-694) at 17-18.

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(6) Since the direct, immediate, and primary effect of the statute is to favor and promote religious schools in Pennsylvania, the statute violates the Establishment Clause of the First Amendment.

III. STATISTICS ON NONPUBLIC SCHOOL ENROLLMENT IN PENNSYLVANIA

The Brief for Appellant Crouter, in No. 72-620,[3] challenges the factual basis for the district court's assertion in its order granting summary judgment that

> "more than 90% of the children attending nonpublic schools in the Commonwealth of Pennsylvania are enrolled in schools that are controlled by religious organizations or that have the purpose of propogating [*sic*] and promoting religious faith . . . ." App. 87a.

Since such a factual statement is central to the appropriateness of the primary effect test in this case, amici submit that the Court may take judicial notice of the figures that appear in the following table:

Academic year	Total enrollment: All Pennsylvania nonpublic elementary & secondary schools	Enrollment in Pennsylvania Roman Catholic elementary & secondary schools	Roman Catholic enrollment as a percentage of total enrollment
1969-70	541,969[4]	497,071[5]	92%
1970-71	517,151[6]	470,105[7]	91%
1971-72	486,827[8]	430,790[9]	88%

[3] See Brief of Appellant Crouter at 26, 34, and 39-41.

[4] Bureau of Educational Statistics, Pennsylvania Department of Education, Statistical Report of the Secretary of Education for the School Year Ending June 30, 1971, Table 12, at p. 19 (Statistical Report Series No. 18, 1972).

[5] *Ibid.*

[6] *Ibid.*

[Footnotes continued on page 14]

We have not found complete published figures concerning other religious schools in Pennsylvania for the years in question, but it appears that their enrollment would amount to at least 2 per cent of the total nonpublic school enrollment.[10]

[Continued]

[7] National Catholic Educational Association, Research Department, U.S. Catholic Schools, 1971-72, Table 1-6 (1972). The Pennsylvania Statistical Report, *supra* note 4, gives 470,478 for this figure, but we have chosen the smaller figure for the table. No explanation for the discrepancy between the two sources is apparent.

[8] Bureau of Educational Statistics, Pennsylvania Department of Education, Projections: Selected Educational Statistics for Pennsylvania to 1981-82, Tables 3 & 4, at pp. 8 & 9 (1972). Table 3 gives 360,553 as the actual (not projected) enrollment of elementary students in nonpublic schools in the fall of 1971. Table 4 gives 126,274 as the actual enrollment of secondary students in nonpublic schools in the fall of 1971. The sum is the figure in the table. The Pennsylvania Statistical Report, *supra* note 4, the source for the earlier figures, stops with 1970-71.

A much larger figure for Pennsylvania nonpublic school enrollment in 1971-72—564,600—appears in the Digest of Educational Statistics, 1971, published in 1972 by the U.S. Department of Health, Education and Welfare (National Center for Educational Statistics, DHEW Publication No. (OE) 72-45, 1972). See Table 40, at p. 34. But the table is specifically entitled "*Estimated* enrollment in nonpublic elementary and secondary schools, by State: Fall 1971" (emphasis added), and the indicated source confirms that the figures are estimates. Since the Pennsylvania Department of Education statistics are specifically labeled "actual" rather than "projected," we submit that they are the reliable figures.

[9] U.S. Catholic Schools, 1971-72, *supra* note 7, Table 1-6.

[10] See Pennsylvania Statistical Report, *supra* note 4, Table 8, at pp. 12-13. This table, entitled "Summary of Census Enumeration of Children, by County, 1970-71—Part B—From Age Six Through Age Seventeen" gives 37,038 as the enrollment in nonsectarian nonpublic schools for the year in question, and 488,121 as the enrollment in sectarian nonpublic schools. Their total—525,159—is slightly more than the figure of 517,151 given in the table above, but no explanation for the discrepancy is apparent. By the figures in this Table 8, 93% of the Pennsylvania nonpublic school children in 1970-71 attended sectarian schools.

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In short, there is no material difference between New York and Pennsylvania in the percentages of school children enrolled in Roman Catholic and other religious schools.

CONCLUSION

Wherefore, the judgment of the district court should be affirmed insofar as it holds unconstitutional the Pennsylvania Parent Reimbursement Act for Nonpublic Education.

Respectfully submitted,

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